Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Broadnet Teleservices LLC	)	
Petition for Declaratory Ruling	)	
	)	
National Employment Network Association	)	
Petition for Expedited Declaratory Ruling	)	
	)	
RTI International	)	
Petition for Expedited Declaratory Ruling	)	

To: Secretary, Federal Communications Commission

OPPOSITION TO PETITION FOR RECONSIDERATION
BY THE NATIONAL OPINION RESEARCH CENTER

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EXECUTIVE SUMMARY

The National Opinion Research Center at the University of Chicago (NORC) opposes the Petition for Reconsideration filed by the National Consumer Law Center (NCLC) on behalf of a range of organizations seeking reversal of the Commission's *Declaratory Ruling* clarifying that the federal government is not considered a "person" under the Telephone Consumer Protection Act (TCPA) and further, that contractors acting on its behalf and following governmental instructions have the benefit of that exemption. The Commission was well founded in reaching these determinations and it appropriately recognized the well-established need for and role of federal social science surveys that by necessity include random sampling for statistical significance and in some cases, oversampling, to capture critical information from underrepresented populations. Federal surveys on health, welfare and other matters are used to inform and to direct critical national policies in a wide number of areas that directly touch on and improve the lives of the very Americans NCLC claims to represent.

It is an irrefutable fact that federal statistics rely on representative telephone surveys of Americans. And it is not possible to perform representative surveys without the ability to reach individuals in the 47.7 percent of U.S. households that do not have landlines who must be included in survey samples. A prior consent to be called framework plainly is incompatible with the ability to contact individuals by wireless phone for an official government purpose. Moreover, the nature of the call from a TCPA perspective should not change simply because the government has chosen to direct a third party to call the public on its behalf.

On reconsideration, NCLC has the burden to demonstrate that the Commission missed something material in its legal and policy analysis that requires revision; instead, the NCLC Petition relies only on unsubstantiated, broad-brush assertions that the *Declaratory Ruling* is "dangerous" and that rampant, abusive calling of the public will result. Given that the calls are

coming from the federal government pursuant to its need for data that it can best get by telephone based surveys, there is no basis for believing that the public will be harmed by these necessary calls. The Commission should reject these assertions as the unfounded speculation that it is and reaffirm its statutory interpretation and clarification.

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OPPOSITION TO PETITION FOR RECONSIDERATION

The National Opinion Research Center at the University at Chicago (NORC) files this Opposition to the Petition for Reconsideration filed by the National Consumer Law Center (NCLC) of the Federal Communications Commission's *Declaratory Ruling* disposing of three separate petitions.[1] As discussed herein, the arguments made by NCLC in its Petition were

[1] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC, Petition for *Declaratory Ruling*, National Employment Network Association Petition for Expedited *Declaratory Ruling* and RTI International Petition for Expedited *Declaratory Ruling*, FCC 12-72, CG Docket No. 02-278, (rel. July 5, 2016) ("*Declaratory Ruling*"). The National Consumer Law Center, on behalf of a number of legal aid and legal advocacy entities, filed a Petition for Reconsideration of the Declaratory Ruling and Request for Stay Pending Reconsideration on July 26, 2016 ("NCLC Petition"), which the Bureau bifurcated, directing that comments on (or oppositions to) each request proceed on separate tracks. While this Opposition addresses only the request for

raised and considered by the Commission and NCLC offers no reason for the Commission to revisit either its statutory interpretation or its overall approach on reconsideration.

I. INTRODUCTION

Founded in 1941, NORC at the University of Chicago helped to establish and continues to strengthen the constantly evolving field of social science research.[2] Numerous data collection and analytical tools that now set the industry standard were pioneered at NORC. Since its early years—when wartime public polling first brought the organization to prominence—NORC has enriched public policy research and fact based decision making by gathering and distilling critical information and contributing to the creation of new bodies of knowledge. As a non-profit organization committed to serving the public good, NORC's work continues to inform decision makers and provides the foundation for effective solutions. NORC's research expertise grows out of its long history of working with government agencies, academic institutions, foundations, among other organizations. Its staff includes rigorously trained and widely published leaders from a diverse array of fields such as health, education, economics, security, mental health, criminal justice, the environment, international development, and more.[3] NORC's work is enhanced by its strong collaborative relationships with prominent experts, senior government officials, and leading scholars, among others. NORC maintains a large and flexible field staff

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reconsideration, NORC also views the NCLC's Motion for Stay of the *Declaratory Ruling* as unjustified.

[2] As one of the oldest not-for-profit, academic research organizations in the United States, and through its affiliation with the University of Chicago, NORC maintains the highest standards of professional excellence and scientific rigor, and is committed to broad dissemination of its findings.

[3] These experts are organized into substantive research departments and centers that collaborate with NORC's statistics, technology, and operations groups to deliver core capabilities to clients.

and call centers to support a variety of long-term and quick-response national and international projects. NORC has direct and deep experience as a federal contractor for essential periodic federal government surveys. Notably, all surveys that NORC conducts for its federal clients that involve human subjects as respondents must be reviewed and approved by NORC's or the federal client's Internal Review Board (IRB), a committee that reviews and approves research involving human subjects. The IRB's purpose is to ensure that all human subject research be conducted in accordance with federal, institutional, and ethical guidelines.

NORC was among the entities that engaged with the Commission on the significant legal and policy questions raised in particular by the RTI Petition for Expedited Declaratory Ruling (RTI Petition) as these questions go to the core of the federal government's ability to collect information necessary to yield informed public policy.[4] NORC supports both the RTI Petition and the Commission's *Declaratory Ruling*. Given the pendency of Telephone Consumer Protection Act (TCPA) litigation on the question of whether the federal government is a "person" and whether parties standing in the shoes of the federal government may rely upon that exemption, the Commission's interpretation of the statute was necessary to create more certainty in a very litigious TCPA environment.

It is troubling that NCLC failed to engage at the Commission previously to raise its legal and policy concerns; however, it is abundantly plain that the core concerns of the NCLC were

[4] *See e.g.*, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, RTI International, the Consortium of Social Science Associations, the Council of Professional Associations on Federal Statistics, and NORC at the University of Chicago, Notice of September, 30, 2015 Ex Parte Meeting, CG Docket No. 02-278, (Oct. 05, 2015); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, the Consortium of Social Science Associations, the Council of Professional Associations on Federal Statistics, and NORC at the University of Chicago, Notice of Oct. 15, 2015 Ex Parte Meeting, CG Docket No. 02-278, (Oct. 19, 2015).

raised by other commenters and were addressed squarely in the *Declaratory Ruling*. On reconsideration then, NCLC has the burden to demonstrate that the Commission missed something material in its analysis. Instead, NCLC relies only on unsubstantiated, broad-brush assertions that the *Declaratory Ruling* is "dangerous" and "devastating" and that rampant, abusive calling of the public will result.[5] There is no basis for believing that that will happen, and the Commission should reject this as the unfounded speculation that it is.

Conversely, the record in the underlying proceeding demonstrates that reversal of the *Declaratory Ruling* would directly and adversely affect the ability of the federal government to collect and to validate America's federal statistics, which measure and gauge progress in virtually every aspect of American life. It is an irrefutable fact that federal statistics rely on representative surveys of Americans. And it is not possible to perform representative telephone surveys without the ability to reach individuals in the 47.7 percent of U.S. households that do not have landlines who must be included in survey samples. NCLC appears to fail to appreciate that the federal government needs effective ways to survey representative populations so as to measure and validate the effectiveness of the very programs that low income and other Americans access and depend upon. The *Declaratory Ruling's* clarifications thus are critically important and must be preserved on reconsideration.

II. THERE WAS FULL NOTICE OF THE RELIEF SOUGHT BY RTI AND NCLC's ARGUMENTS WERE CONSIDERED AND REJECTED BY THE COMMISSION.

In a vain attempt to make the case that its views were not represented and that NCLC somehow lacked an opportunity to present legal and policy arguments against the relief sought, NCLC entirely overlooks the record in the RTI proceeding. Thus, its assertions are hollow and

[5] NCLC Petition at 2.

cannot be credited.[6] Comments on the RTI Petition were filed by several individuals who opposed the relief both on the grounds that the statute could not be interpreted in the manner RTI urged and on the policy premise that consumers did not wish to receive autodialed calls on wireless phones from the federal government or government contractors. The *Declaratory Ruling* in fact cites these comments and reply comments in its discussion, which raises the question why NCLC could not have filed comments in response to the Public Notice given its strongly expressed views.[7] There also was additional *ex parte* activity that NCLC could also have reviewed prior to the Commission's vote on its *Declaratory Ruling*.[8]

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[6] There is no question that the RTI Petition described the issue that led to its filing a Petition for Expedited *Declaratory Ruling* and RTI did not hide the nature of the relief it sought nor its reasons for having filed its Petition. Similarly, the FCC's Public Notice publicizing the Petition provided full notice of the scope of RTI's request. The fact that other commenters filed and addressed these issues further undercuts any argument that the relief sought was not fully noticed.

[7] As the Commission has observed:

> Section 553(b) of the APA requires that an agency afford interested parties adequate notice of, and an opportunity to comment on, the provisions that appear in the agency's final regulations. Courts have interpreted this to require that an agency provide "sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."

In the Matter of Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers, 13 FCC Rcd 17018, 17069, 1998 FCC LEXIS 3472 (July 14, 1998), *citing* Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989). The Commission's public notices are issued to achieve this goal. *Id*. at ¶ 97.

[8] The Commission also took *ex parte* meetings with interested parties to explore the contours of the legal and policy implications of granting the RTI Petition. *Ex parte* notices were filed in the docket to summarize those meetings and they provided detail about federal government survey work and the need to call wireless phones to reach certain populations to be studied. One need only review the FCC's electronic docket following the release of the Supreme Court's *Campbell Ewald* opinion to see a range of *ex parte* comments as to how the filer believed the outcome of the case affected the pending petitions. NCLC had the ability to monitor these *ex parte* filings and to make its own. It is simply not accurate to assert that consumer issues were never raised or considered in the proceeding.

NCLC has failed to show any reason why it could not have participated prior to filing its Petition for Reconsideration and that is a basic procedural defect of its Petition under Commission rules.[9] Thus, there is no reason for the agency to reconsider the same arguments that it considered before and rejected simply because the NCLC petitioners claim to have been surprised by the result. The exercise of ordinary diligence is required under Commission rules.

If the Commission nevertheless overlooks these defects and considers the Petition for Reconsideration on the merits, it is plain that NCLC has not provided any material that would require the Commission to change course. The NCLC Petition appears not to argue directly with the *Declaratory Ruling's* holding that the federal government is not a "person" under the TCPA, but NCLC does contest the Commission's determination that the federal government can conditionally extend that exemption to its chosen contractors. NCLC argues that contractors are "persons" under the TCPA and additionally asserts that for policy reasons the Commission should reach that result on reconsideration.

Notably, the Commission recognized that prohibiting the federal government from making autodialed calls would impair, "in some cases severely," the government's ability to communicate with the public and to collect the data needed to form the basis of critical public

[9] 47 CFR 1.106(b)(2)-(3) ("A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious."); *see, e.g.*, In re Aerco Broad. Corp., FRN No.: 0003759560, FCC DA 16-620, 2016 FCC LEXIS 1884, at ¶ 3-4 (F.C.C. June 7, 2016) (dismissing a petition for reconsideration because the petitioner's "arguments have all been previously raised and either dismissed or denied by the Commission, as well as by the Division" and therefore the petitioner "ha[d] not presented any new facts or arguments that warrant reconsideration under Section 1.106(b)(2)"); *see also* Doss v. FCC, 2004 U.S. App. LEXIS 9806, *1 (D.C. Cir. May 17, 2004) (noting that a party's "petition for reconsideration was not based on new facts or changed circumstances," and affirming that "FCC staff therefore permissibly dismissed the petition as repetitious.").

policy determinations.[10] From that, the Commission further determined that when a contractor is acting on behalf of the federal government, that it should not be treated as a "person" in that particular context. Otherwise, the Commission reasoned that under its precedent the government could be:

> vicariously liable for telephone calls placed by third-party agents acting within the scope of their actual authority. If the TCPA applied to contractors calling on behalf of the federal government, this rule would potentially allow the government to be vicariously liable for conduct in which the TCPA allows the government to engage. That would be an untenable result.[11]

Critically, this delegated prerogative to call a wireless phone number using an autodialer without prior consent was not unbounded. The *Declaratory Ruling* is plain that invocation of the government exemption would only be valid if the activity is authorized by the government and the contractor is acting within the scope of its authority and instructions. Thus, if a government contract specified that there was to be no autodialing of wireless phone numbers, then the contractor who, contrary to these instructions, autodialed would not have the benefit of the exemption because in that case it would not be acting within the scope of its authority and instructions.

The *Declaratory Ruling* recognized that a contrary result would make it difficult, if not impossible, for the government to engage in societally critical public facing activities. As the *Declaratory Ruling* stated: "We can discern no legal or policy rationale that would make it more difficult for the federal government to inform citizens of ways to leave poverty behind or to otherwise contact citizens for similar benevolent purposes."[12]

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[10] *Declaratory Ruling* at ¶ 15.

[11] *Id.* at ¶ 16.

[12] *Id.* at ¶ 19.

Ignoring these compelling points, the NCLC Petition elevates unsupported speculation of a surge of abusive calling over the Commission's practical, measured approach to the contractor issue. NORC's extensive experience in federal statistical survey work confirms that there is ample protection of the public arising from the privacy, confidentiality and disclosure laws under which statistical agencies and their contractors must work to design and direct telephone-based, scientifically sound, and nationally representative surveys. Even if the Commission were to discount those protections, there must be a presumption that that federal government is not seeking to contact individuals to survey them in a harassing manner, and the government can take action if it finds its contractor misbehaving by acting outside of its authority. In that case, the contractor would not have the benefit of the government's prerogative in any event.

The federal government has a strong interest in ensuring that its survey work, whether done directly or through contractors, is done correctly and that the results are reliable. As was recognized in the *Declaratory Ruling*, when the federal government chooses to do essential and legally mandated social science survey work by using contractors for the necessary public outreach and data collection, these contractors effectively stand in the shoes of the government for only this purpose. As the Commission correctly observed, the social science survey work at issue is typically bid under an RFP for the qualitatively best or most cost effective proposal, and surveys are designed and conducted pursuant to Office of Management and Budget (OMB) direction and approval. In some but not all cases, the contractor's employees may become "sworn officers" for their work.[13] Regardless of the particular survey design and details of the

[13] Another pending Petition for Reconsideration filed by the Professional Services Council (PSC) makes a different but important point, specifically that there are a range of federal surveys or other services contracted for that disclaim an "agency" relationship as between the particular government agency and its contractor. NORC agrees with PSC's point that the *Declaratory Ruling* can and should be read that a contractor need not be designated an agent in order to be

work that is done however, as a legal and policy matter there should be no difference in the TCPA liability for a government survey call whether the Centers for Disease Control and Prevention (CDC) or a CDC contractor places an autodialed call to a wireless phone to reach a survey interviewee.

In reaching its determination, the Commission weighed the record, which contains filings that demonstrate the well-established need for and role of federal social science surveys that by necessity include random sampling for statistical significance and in some cases, oversampling, to capture critical information from underrepresented populations. Federal surveys on health, welfare and other matters are used to inform and to direct critical national policies in a wide number of areas that directly touch on and improve the lives of the very Americans NCLC claims to represent.[14] These filings demonstrated that a prior consent to be called framework plainly is incompatible with the ability to contact individuals by wireless phone for an official government purpose. Moreover, as a practical matter it should be plain that the federal

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acting on behalf of the agency who has contracted for the work to be performed and thus operating within the government's prerogative—assuming the work is authorized and within scope.

[14] Providing a comprehensive list of major surveys done for federal agencies under contract is beyond the scope of this Opposition, however, the CDC, as an example, uses contractors for a range of health surveys on a range of subjects, including the BRFSS, the Behavioral Risk Factor Surveillance System, an annual survey conducted by contractors using Random Digit Dialing techniques on both landline and cell phones to collect data for federal and state use. See www.cdc.gov/brfss/about/brfss_faq.htm. The BRFSS is the premier U.S. health related phone survey that collects data about U.S. residents in all 50 states, in DC and 3 U.S. territories. The survey consists of over 400,000 adult interviews each year, and the data gained from the annual survey—that has been done each year since 1984—provides powerful health risk data to target critical and effective health promotion activities.

government does not have the capacity to carry the number of employees required to perform a wide range of specialized ongoing and periodic surveys.[15]

If the federal government looks to contractors to fulfill its statutory or other legal responsibilities to complete statistically significant surveys, it is critical that these contractors have some certainty about the legal status of the calls they make on behalf of and at the direction of CDC and other federal government clients. Without it, these entities operate under the severe threat of what could be massive per call statutory damages under TCPA class actions for work done at the direction of and under supervision by the federal government. There are a number of plaintiff firms that routinely solicit for plaintiffs to file such suits.

The Commission appears to have understood this, and was plain in holding that if the federal government was not a person under the TCPA, when it directs a third party to act on its behalf that that third party should have the same level of protection as the federal government for in-scope, authorized activity. NCLC has provided no sound reason for the Commission to reject or revise that view on reconsideration.

III. NCLC MISUNDERSTANDS THE LEGAL AND POLICY BASIS FOR THE *DECLARATORY RULING*

The record shows that in many cases federal government agencies routinely, for a number of resource or expertise reasons, determine to outsource social science survey calling to contractors. The Commission in its *Declaratory Ruling* correctly concluded that that choice by

[15] The conditions under which contracting is most cost-effective differs depending on the capacity of a particular federal agency and the periodicity of the survey at issue. There truly is no "one size fits all" answer and it should be up to federal agencies to have the choice of doing data collection directly or indirectly. Significantly, a number of studies are Congressionally-mandated and materially advance public health and welfare based on the information and insights they provide. Notably, much of the data collected by the federal government via telephone surveys is also used by state and local governments and NGOs to maximize the effectiveness of their programs, including most likely some of the entities that joined the NCLC Petition.

the federal government of the calling entity should not have a legal consequence under the TCPA. NCLC's Petition challenges the notion that the government should be able to perform its mission indirectly rather than directly and NCLC misstates this actual holding of the *Declaratory Ruling*, framing it as: "all contractors who are agents of the federal government are exempt from TCPA coverage."[16] Leaving aside the nebulous nature of what NCLC means by "TCPA coverage," one could only reach that conclusion by ignoring the *Declaratory Ruling's* important and explicit limiting principles to the availability of the governmental exemption to contractors.[17]

The NCLC Petition further identifies a range of troubling calling practices that it asserts will occur with impunity at any time if federal contractors make use of the exemption.[18] These assertions of abuse of the public are misplaced. As was pointed out in the thoughtful oppositions filed to NCLC's Motion for Stay, there is no reason to believe the public will see any difference at all in the frequency or content of calls they receive from the federal government, regardless of whether they are placed by the government or by a contractor.[19] There is no reason to expect the federal government wishes to harass or annoy citizens, but there is every reason that the Communications Act and the Commission's rules should be interpreted in a manner that supports the federal government's critical mission of gathering social science survey information via

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16 NCLC Petition at 9.

17 *See Declaratory Ruling* at ¶ 17: "we clarify that a government contractor who places calls on behalf of the federal government will be able to invoke the federal government's exception from the TCPA when the contractor has been validly authorizes to act as the government's agent and is acting within the scope of its contractual relationship with the government and the government has delegated to the contractor its prerogative to make autodialed or prerecorded or artificial voice calls to communicate with its citizens."

18 NCLC Petition at 17-18.

19 *See* RTI Opposition to Request for Stay at 6, CG Docket No. 02-278, filed August 11, 2016.

calling wireless phones. The identity of the entity calling for the federal government – which is solely and uniquely in the hands of the federal government to determine – should not change the legal nature of the call.

Second, NCLC misunderstands the applicable TCPA exemption to conclude that time of day or other autodialing restrictions to wireless phones would never be relevant. Even if one could make an absolute statutory exemption argument to allow federal government social science surveyors to autodial calls to wireless phones at 3 am, it is not reasonable to assume any federal government agency or contractor would be so reckless as to place calls at that time. Not only would they would be unlikely to reach a willing survey subject, they risk an antagonistic response. Likewise, NCLC plainly failed to consider why, as a practical matter, either the federal government or its contractors would aim to make calls to public safety answering points or to emergency dispatch personnel or to hospital emergency rooms; none of those calls would be productive in terms of yielding survey subjects. Even if one assumed that the government or its contractors did not care about bothering these unlikely targets, which is a very dubious assumption, then one could conclude from an efficiency standpoint that the government or its contractors would want to spend their time in the most cost effective manner, meaning that they would call wireless phones that are likely to reach likely survey participants. NCLC points to nothing but its own overblown rhetoric to make a case that federal government calling by contractors would be reckless or unreasonable.[20]

[20] While the Commission noted that it did not credit the overblown assertions that its action would create "an 'explosion of unwanted calls accompanied by chaos and abuse" the *Declaratory Ruling* stated that "we believe we have reached the best interpretation of Congress's intent to exempt the federal government from the prohibitions in section 227(b)(1), even if that interpretation might lead to more unwanted calls that would otherwise be the case." *Declaratory Ruling* at ¶ 22.

It is certainly the case that in order to get statistically representative surveys accomplished that calls may have to be made more than once to a particular phone number, so that the likelihood of a live interview taking place is greater, but that is a matter for the federal agency directing the survey to determine for itself. It is critical that the Commission, on reconsideration, not limit the duration or frequency of federal government social science survey calls.

Third, NCLC incorrectly suggests that the Commission somehow misunderstood and then misapplied the Supreme Court's *Campbell-Ewald* opinion in reaching the conclusions it did about the role and legal status of contractors that call individuals on behalf of the federal government.[21] In fact, the *Declaratory Ruling* cited the Supreme Court case for its holding that the federal government is not a "person" under the TCPA. NCLC cannot credibly claim otherwise as the *Declaratory Ruling* is plain on its face that that is all the Commission relied on the case for, and not for any other purpose.[22] The Commission did not misunderstand the language in the opinion on sovereign immunity, nor was the *Declaratory Ruling* based on it.

Specifically, the Commission determined that if the federal government is not a person under the TCPA, then it could place calls to the public that would otherwise be prohibited under the statute if there was no prior consent. The Commission also concluded that if the federal government chooses to delegate these same calling functions to a third party under its supervision, then the federal government's designee would be acting on behalf of the government and for that particular activity would have the benefit of the exemption. This result is consistent with the Commission's 1993 *Declaratory Ruling* in the DISH case on vicarious

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[21] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (Jan. 20, 2016).

[22] See *Declaratory Ruling* at ¶ 20.

liability.[23] The result is not dependent upon a particular theory of federal common law agency, as some federal contracts may have agency language, or have sworn officers, others may disclaim agency, but in each case the contractor is plainly still acting on behalf of the federal government and under its supervision in performing its duties.

IV. THERE IS NO INCONSISTENCY BETWEEN THE *DECLARATORY RULING* AND THE BUDGET ACT

The NCLC Petition for Reconsideration also questions how the Commission could have reached the conclusion it did concerning the qualified exemption of calls by contractors consistent with the language contained in the 2015 Budget Act. Specifically, NCLC states that "[t]he 2015 Budget Act Amendments make it clear that the TCPA applies to federal contractors, as the Amendments would not have been necessary if the TCPA were not applicable."[24]

However, as the Commission itself has noted, the Budget Act's TCPA provision that treated the government as a person for purposes of specifying legislative relief was passed prior to the Commission acting on the RTI/NENA/Broadnet petitions.[25] Thus, the choice of language

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[23] *See* In re DISH Network, LLC, 28 FCC Rcd 6574 (2013)("DISH *Declaratory Ruling*"). In the DISH *Declaratory Ruling*, the Commission FCC applied principles of agency law to conclude that:

> A seller does not generally 'initiate' calls made through a third-party telemarketer within the meaning of the TCPA, [but] *it nonetheless may be held vicariously liable under federal common law principles of agency* for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.

Id. at ¶ 1 (emphasis added). Accordingly, it stands to reason that the same principles would inform the Commission's decision to extend the federal government's exemption to contractors acting at its direction and under its supervision.

[24] NCLC Petition at 12.

[25] *See* In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, *Report and Order*, FCC 16-99, ¶ 63 (Aug. 11, 2016) ("Budget Act Report and Order") (notes omitted):

> [W]hen Congress passed [the Budget Act], the Commission had not yet resolved whether the federal government or its contractors are "person[s]" subject to the

used in the legislation was understandable given that the Commission had not ruled on these petitions seeking clarification at the time the legislation was passed. Concern about certainty was a motivating factor for the federal government's seeking to have the 2015 Budget Act provision passed specifically so that private entities working with the federal government to assist the government in matters of debt collection would have certainty that using an autodialer to reach persons with government debt on a wireless phone would not invite TCPA lawsuits. However, the legislation does not undercut the Commission's determination in its *Declaratory Ruling* that under Section 227(b)(1) of the Communications Act the federal government is not a "person." Rather, as the Commission in its recent Report and Order observed, the Budget Act "focuses on the type of calls made to a cellular number and not the identity of the caller" and thus "is consistent both with the Budget Act and with the *Broadnet Declaratory Ruling* in which we recently found that the federal government and its agents are not 'persons' covered by section 227(b)(1)."[26] In fact, the Commission observed that "it seems clear that Congress's goal in

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> prior-express-consent requirement of section 227(b)(1)(A)(iii). Against this backdrop (of which Congress presumptively was aware), Congress wrote subsection (b)(2)(H) in language that does not limit the Commission's regulatory authority under this new subparagraph to "persons." This decision indicates that Congress intended the regulations adopted under this new subsection to apply to all callers, not just those who qualify as "person[s]" under the statute, and thus to apply to the federal government and government contractors even if the Commission were to find (as it later did) that those entities do not qualify as "persons" under subsection (b)(1)(A)(iii) . . . . If, on the other hand, Congress had wanted to exclude the federal government or government contractors from the frequency and duration limits, it naturally could have done so by adding language to that effect . . . . That Congress opted not to include such a proviso supports our conclusion that Congress's intent in adopting section 301 was to authorize the Commission to limit the frequency and duration of any debt collection call that meets the parameters of section 227(b)(2)(H), without regard to the identity of the caller.

[26] Budget Act Report and Order at ¶ 61.

adding section 227(b)(2)(H) was to protect consumers by ensuring that calls that are excepted from the consent requirement are nonetheless regulated in other respects."[27]

Certainly Congress could direct the Commission to consider adopting rules that provide additional consumer protections on federal debt collection calls without in any way disturbing the clarifications the Commission provided in its *Declaratory Ruling*. The Budget Act implementation Report and Order discusses at length the Commission's view of how the Budget Act folds into and supports the Commission's determinations made in its *Declaratory Ruling*. Contractors supervised by the government doing social science survey work that the government could otherwise do directly must have that certainty to proceed with their work. NORC fails to see how the 2015 Budget Act amendment to the TCPA undercuts the Commission's necessary interpretation of the TCPA to support critical telephone-based social science survey work performed for the federal government.

V. CONCLUSION

Telephone-based social science surveys require permission-less access to cellphones and many surveys require reaching under-represented or low income populations, such as those NCLC states it represents, so that they can be better served by more informed federal government decision making on health and welfare resources and on many other critical societal matters. NCLC cannot complain if the federal government directly calls individuals on their wireless phones; and its complaint about contractors acting recklessly or wantonly on behalf of

[27] Budget Act Report and Order at ¶ 62 (notes omitted).

and under the supervision of the federal government is based on assertions and fears, not fact.

NORC opposes NCLC's Petition for Reconsideration of the *Declaratory Ruling*.

Respectfully submitted,

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